a

LEMBAGA PELABUHAN JOHOR

v.

THE PACIFIC BANK BHD

b

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 23-185-1988]
16 NOVEMBER 1997

c ***CIVIL PROCEDURE:*** *Pleadings - Amendment of defence - Delay in applying - Whether leave should be granted - Whether delay excusable - Affidavit evidence - Importance of*

CONTRACT: *Guarantee - Construction of - Similarities with law of contract - Use of extrinsic evidence - General principles on guarantees*

d The plaintiff entered into a contract with one Sykt Indrawati Malaysia Sdn Bhd ('Indrawati') for the construction by Indrawati of an access bridge to the free trade zone in the Johor Port area. The defendant guaranteed in writing the due performance, completion and maintenance of the contract works by Indrawati, and in the event of a breach by the said Indrawati of its obligations e under the contract, the defendant shall indemnify the plaintiff a certain sum of money. Indrawati defaulted in the completion of the contract works and the plaintiff terminated the contract and claimed against the defendant based on the said guarantee.

f A statement of defence was filed by the defendant. However, after the case had been set down for trial by the court and after a lapse of approximately nine years after the writ of summons and the statement of claim were filed, the defendant made an application to amend its statement of defence by adding a new paragraph to it.

g **Held:**

[1] It was not disputed that the proposed amendment to the original statement of defence was filed at a very late stage. It was a protracted, prolonged and inexcusable delay. The allegations by the plaintiff that the proposed amendments were useless, not *bona fide* and was intended to delay the h plaintiff's claim met with no response from the defendant in the form of an affidavit. The defendant knew that there was prolonged delay yet it failed to give an explanation by way of affidavit evidence.

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[2] An affidavit is an indispensable tool in the interlocutory process as the Rules of the High Court 1980 invariably requires an application to be supported by an affidavit. An affidavit must be filed as it serves as evidence for the court to rely upon and decide accordingly.

[3] A guarantee is a contract where the promisor undertakes to be accountable to the promisee for the debt, default or miscarriage of another. Suretyship arises out of a contract. The law of guarantee is part of the law of contract.

[4] The principles to be applied in construing contracts of guarantee are the same as those that are applied in construing contracts generally. In dealing with a guarantee strictly as a mercantile contract, the court will not apply technical rules but rather will construe it in such a way as to fairly reflect what may fairly be inferred to have been the parties' real intention and understanding as agreed and expressed by them in writing in order to give full effect to it.

[5] Extrinsic evidence of the whole factual scenario is admissible and it is always necessary for the purpose of ascertaining whether the particular words in the guarantee will apply to that factual situation and the terms of the contract. In Malaysia, the extend to which extrinsic oral evidence may be adduced is governed by ss. 91 and 92 of the Evidence Act 1950. There are, however, dangers in admitting oral evidence in cases where there is a written agreement.

[6] On the *contra proferentum* rule, if the words in a guarantee are ambiguous, the guarantee should be construed strictly against the guarantor as the guarantor is the maker of the statement.

[7] The essentials of a guarantee are on all fours with that of any other contract and they are well documented. Leave to amend a statement of defence will definitely be granted to enable the defendant to raise a defence arising from a change in the law since the commencement of the proceedings affecting the rights of the parties or the relief or remedy claimed by the plaintiff notwithstanding the fact that this may lead to additional delay and expense and the trial may be protracted. However, the law in regard to a contract of guarantee is well settled. There is no new development to the law on contracts of guarantee so as to warrant the defendant to amend the original statement of defence to incorporate the proposed amendment.

[8] Although the instant court was bound by the principles laid down by the Court of Appeal in *Abdul Johari Abdul Rahman v. Lim How Chong & Ors* regarding the application for amendments, it was able to distinguish the present case in that there was a delay of nine years before the defendant filed the application to amend its statement of defence.

[Application to amend dismissed with costs.]

Cases referred to:

Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 ***(dist)***
Abu Bakar v. Mohamed Zain [1967] 1 MLJ 168 ***(refd)***
Application des Gaz SA v. Falks Veritas Ltd [1974] Ch 381 ***(cit)***
Bank of Montreal v. Munster Bank [1876] 1R 11 CL 47 ***(cit)***
Bank of Scotland v. Wright [1991] BCLC 244 ***(cit)***
Barber v. Mackrell [1892] 68 LT 29 ***(cit)***
Braithwaite v. Kearns 34 Beau 202 ***(refd)***
Charrington & Co Ltd v. Wooder [1914] AC 71 HL ***(cit)***
Chew Soon Tat v. Malaysia National Insurance Sdn Bhd [1977] 1 MLJ 241 ***(refd)***
Chip Chong Sawmill Co Sdn Bhd & Ors v. Chai Khiun Fui [1978] 2 MLJ 24 FC ***(refd)***
Eastern Union Railway Co v. Cochrane [1853] 9 Exch 197 ***(cit)***
Edwards v. Jevons [1849] 8 CB 436 ***(cit)***
Eshah Saat v. Meriam Sa'at & Ors [1975] 2 MLJ 97 ***(refd)***
Eshelby v. Federated European Bank Ltd [1932] 1 KB 254 ***(cit)***
Faber v. East of Lathom [1897] 77 LT 168 ***(cit)***
Jeyaretnam Joshua Benjamin v. Lee Kuan Yew [1990] 2 MLJ 65 ***(refd)***
Kandasami v. Mohamed Mustafa [1983] 2 MLJ 85 ***(refd)***
L Schuler AG v. Wickman Machine Tool Sales Ltd [1974] AC 235 ***(cit)***
Lombard Finance Ltd v. Brookplain Trading Ltd [1991] 2 All ER 762 ***(cit)***
Malaysia National Insurance Sdn Bhd v. Abdul Aziz Mohamed Daud [1979] 2 MLJ 29 ***(refd)***
Mason v. Pritchard [1810] 12 East 227 ***(cit)***
Mayer v. Isaac [1840] 6 M & W 605 ***(cit)***
Merle v. Wells [1810] 2 Camp 413 ***(cit)***
M'Iver v. Richardson [1813] 1 M & S 557 ***(cit)***
Morten v. Marshall [1863] 2 H & C 305 ***(cit)***
Moschi v. Lep Air Services Ltd [1973] AC 331 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 699 ***(refd)***
Other v. Iveson [1855] 3 Drew 177 ***(cit)***
Pioneer Shipping Ltd v. BTP Tioxide Ltd [1982] AC 724 ***(refd)***
Re Stration, ex p Salting [1883] 25 Ch D 148 ***(cit)***
Sorby v. Gordon [1874] 30 LT 528 ***(cit)***
Tan Chong & Sons Motor Co Sdn Bhd v. Alan McKnight [1983] 1 MLJ 220 ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229 ***(refd)***
Westhead v. Sproson [1861] 6 H & N 728 ***(cit)***
York City & Country Banking Co v. Bainbridge [1880] 43 LT 732 ***(cit)***

Legislation referred to:
Contracts Act 1950, ss. 79, 80, 81
Evidence Act 1950, ss. 91, 92
Rules of the High Court 1980, O. 34 r. 3

For the plaintiff - Jeyakumar Sundralingam; M/s Reginald Vallipuram & Co
For the defendant - Ling Hua Khong; M/s Cheang & Ariff

JUDGMENT

Abdul Malik Ishak J:

This case was scheduled for open court hearing on two successive days, namely 27 October 1997 and 28 October 1997. The agreed bundle of documents in encl. 69 and the bundle of pleadings in encl. 71 were nicely bound and filed on 8 July 1997 and 14 July 1997 respectively. In setting down this case for trial within the ambit of O. 34 r. 3 of the Rules of the High Court 1980 ('RHC'), encls. 69 and 71 were filed. In short, lodging documents when setting down this case for trial have been complied with as reflected in encl. 73. Order 34 r. 3 of the RHC states as follows:

> (1) In order to set down for trial an action, the party setting it must deliver to the Registrar, by post or otherwise, a request in Form 63 that the action may be set down for trial together with two bundles (one of which shall serve as the record and the other be for the use of the judge) consisting of one copy of each of the following documents, that is to say:
>
> (a) the writ;
>
> (b) the pleadings (including any affidavits ordered to stand as pleadings), any notice or order for particulars and the particulars given; and
>
> (c) all orders made on the summons for directions.
>
> (2) Such bundle must be bound up in the proper chronological order and have indorsed thereon the names, addresses and telephone numbers of the solicitors for the parties or, in the case of a party who has no solicitor, of the party himself.

On 27 October 1997, the statement of agreed facts (encl. 82) was filed. Unfortunately, on 27 October 1997 when this case came up for hearing Mr. Ling Hua Keong, the learned counsel for the defendant, sought for an adjournment as he proposed to amend the statement of defence. This application did not come as a surprise to the court as Mr. Ling Hua Keong had by letter dated 23 October 1997 (encl. 86) applied for an adjournment and intimated that he would be filing an application to amend the statement of defence. Mr. Jevakumar Sundralingam, the learned counsel for the plaintiff,

submitted that he would be objecting to the application for amendment of the statement of defence. It was on these facts that the dates for hearing were vacated. As agreed the defendant was ordered to pay RM200 to the plaintiff for the adjournment. Undeniably, it was an unhealthy trend to adjourn the hearing of this case. Hopefully, there would not be a recurrent of this episode.

The defendant has since filed an application (encl. 77) on 24 October 1997 to amend the statement of defence by adding a new para 7 divided into three part. Enclosure 77 was supported by a certificate of urgency that was filed on 24 October 1997 as reflected in encl. 79. The proposed amendments are as follows:

> 7. Further and/or in the alternative, the defendant contends and will contend that:
>
> 7.1. Under the contract entered into between the plaintiff and Syarikat Indrawati (M) Sdn Bhd, the completion date of the works was stipulated as 20th September 1985. However completion date was subsequently altered and extended 16th October 1985.
>
> 7.2. At all material times, the defendant was not informed of such arrangement or alteration. Accordingly, the said arrangement or alteration was made without the consent nor knowledge of the Defendant.
>
> 7.3 In the premises, the Defendant is discharged from its guarantee or obligation under the said Bank Guarantee.

In support of encl. 77, Lim Gin Gee as the manager of the defendant's bank affirmed an affidavit in encl. 78 on 23 October 1997 and there he deposed that the proposed amendments were made as a result of an inadvertent mistake which was not meant to delay the proceedings nor to show disrespect to the court. He deposed that he was advised by his counsel and verily believed that the proposed amendments were necessary in order to reflect the true nature of the defendant's defence and that it would not in any way prejudice the plaintiff.

By way of a rebuttal, the plaintiff through Maimoon bte Sirat, the secretary of the plaintiff's company affirmed an affidavit-in-reply on 6 November 1997 in encl. 88 and there she deposed and highlighted the historical facts to the whole case. This was what she deposed:

(1) That the plaintiff filed the writ of summons and the statement of claim (encl. 2) on 4 June 1988.

(2) That the defendant filed their statement of defence (encl. 6) on 20 January 1989.

(3) That the plaintiff filed a summons-in-chambers on 4 May 1989 which was dated 1 May 1989 (encl. 7) for final judgment in the action against the amount claimed in the statement of claim with interest, if any, and costs. Unfortunately, encl. 7 was not entertained by the court.

(4) That the summons for directions was ordered to be issued by the court on 26 June 1995 (encl. 67).

She further denosed that she was advised and verily believed that the defendant filed the application in encl. 77 after a lapse of approximately nine (9) years after the writ of summons and the statement of claim were filed. To her that was a protracted delay that had the effect of delaying the plaintiff's claim. It was further deposed that upon advice, she verily believed that the proposed amendments could but was not filed earlier. In the alternative, she was advised to say and she verily believed that the proposed amendments were untenable in law as it contravened cl. 2 of the bank guarantee. Finally, she deposed that the proposed amendments were not only useless but it was made without *bona fide* and, consequently, it should not be allowed.

It was not disputed that the proposed amendments were filed at a very late stage. It was a protracted, prolonged, and inexcusable delay. The delay was precisely 9 years 4 months 20 days. The allegations that the proposed amendments were useless, lacked *bona fide* and intended to delay the plaintiff's claim met with no response whatsoever by the defendant in the form of an affidavit. The defendant knew that there was this prolonged delay yet they failed to give an explanation by way of an affidavit evidence. In *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 699 CA, Gopal Sri Ram JCA placed great emphasis on affidavit evidence when his Lordship remarked, as reflected in the headnote to the case, the following cogent words:

> It is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually treated as an admission by him of the fact so asserted.

An affidavit is an indispensable tool in an interlocutory process as the RHC invariably requires an application to be supported by an affidavit. The sting of an affidavit evidence was amply demonstrated in *Braithwaite v. Kearns* 34 Beau 202 where it was held that by reason of the death, illness or absence abroad the deponent cannot attend the trial to be cross-examined then his affidavit may be allowed to be read but the weight to be attached on such

evidence was a matter entirely for the trial court to decide. What is of signal importance is that an affidavit must he filed as it serves as evidence for the court to rely upon and decide accordingly. Lim Gin Gee deposed that the proposed amendments were necessary so as to put to the fore the true nature of the defendant's defence. Maimoon bte Sirat held onto the notion that the necessity of the proposed amendments was not asked for at the earliest possible moment. In this regard, passages appearing in the judgment of Yong J in *Abu Bakar v. Mohamed Zain* [1967] 1 MLJ 168 which are germane to the occasion should be reproduced. This was what his Lordship said at p. 169 of the report:

> Moreover the court will not readily allow at the trial an amendment, the necessity for which was abundantly apparent long before the hearing and then not asked for (*Hipgrave v. Case* [1885] 23 Ch. D 356). In the present case, the petitioner's counsel knew or ought to have known of such necessity long before the hearing, as he had been asked by respondent's counsel to give particulars of para. 4 of his petition. The court will be reluctant to give leave to amend the pleadings at a late stage of the proceedings, unless there is strong justification for so doing (*Loutfi v. Czarnikow Ltd* [1952] 2 All ER 823). In the present case the petitioner has not shown to the court strong justification least of all any justification.

Even though the case of *Abu Bakar v. Mohamed Zain (supra)* revolved on a declaration an election petition yet the principles enunciated therein are germane and applicable to the factual matrix of the present case.

The brief facts of the present case may be stated in this way. The plaintiff entered into a contract with Syarikat Indrawati Malaysia Sdn Bhd ('Indrawati') for the construction by the latter of an access bridge to the free trade zone in the Johor port area, Pasir Gudang, Johore. In consideration of that contract, the defendant guaranteed in writing to the plaintiff on 18 September 1984 the due performance, completion and maintenance of the contract works by Indrawati and the defendant also agreed that in the event of any breach by Indrawati of its obligations under the contract, the defendant was to indemnify the plaintiff up to the sum of RM180,543.30. As events unfolded, Indrawati persistently defaulted in completing the contract works and the plaintiff had no choice but to terminate the contract in writing on 20 March 1986. The plaintiff took steps to conduct remedial works and incurred a sum of RM194,380. On 4 August 1986 the plaintiff through their consultant engineers wrote to the defendant to indemnify the plaintiff the sum of RM180,543.30 being the capital sum for which the defendant agreed to guarantee and indemnify the plaintiff. The defendant, however, failed, refused or neglected to settle that sum.

The original statement of defence (encl. 6), *inter alia*, challenged the validity of the bank guarantee which was said to have expired. In the alternative, the original statement of defence averred that the plaintiff had failed to make a claim under the bank guarantee in accordance with its provisions thereto and within the time prescribed, and flowing from this, an averment was made to the effect that the plaintiff's claim was invalid and unenforceable and that the defendant was not bound nor obliged to pay under or pursuant to the bank guarantee. This was the original statement of defence as it stood before encl. 77 was filed. The defendant was in deep slumber for nine years four months 20 days before they decided to wake up and file encl. 77.

The bank guarantee was exhibited as "MS1" in the affidavit-in-reply of Maimoon bte Sirat (encl. 88) and the terms of that bank guarantee were worded thus:

PACIFIC
BANK

18th September 1984

Johore Port Authority,
Pasir Gudang,
Peti Surat 66,
Pasir Gudang,
JOHOR

Dear Sirs,

Re: **BANK GUARANTEE NO. PYC 84/69**

THIS AGREEMENT is made the 21st day of September 1984 between PACIFIC BANK BERHAD of LG 1 & 2, Plaza Yow Chuan, Jalan Tun Razak, Kuala Lumpur (hereinafter called "the Guarantor") of the one part and the Johore Port Authority (hereinafter called "the Employer") of the other part.

WHEREAS

1) This Agreement is supplementary to a contract numbered LPJ/ 563/84 and day of 1984 (hereinafter called "the Contract") wherein SYARIKAT INDRAWATI MALAYSIA SDN. BHD. (hereinafter called "the Contractor") agreed and undertook to construct, complete and maintain the Works in Contract – Construction of Access Bridge to Free Trade Zone, Johor Port, in conformity with the provisions of the Contract for the sum of Malaysian Ringgit Million Six Hundred And Ten Thousand Eight Hundred And Sixty Six Only (M$3,610,866) being the Tender Sum.

2) The Guarantor has agreed to guarantee the due performance of Contract in manner hereinafter appearing.

NOW the Guarantor hereby agrees with the Employer as follow:

1) If the Contractor (unless relieved from the performance by any clause of the Contract or by statute or by the decision of a tribunal of competent jurisdiction) shall in any respect fail to execute the Contract or commit any breach of his obligations thereunder then the Guarantor will indemnity and pay the Employer the sum of Malaysian Ringgit One Hundred Eighty Thousand Five Hundred Forty Three And Cents Thirty Only (M$180,543.30) being equal to five (5) percent of the Tender Sum provided that the Employer or his authorised representative has made a claim against the Guarantor not later than six (6) months after the expiry date of the Contract.

2) The Guarantor shall not be discharged or released from his guarantee by any arrangement between the Contractor and the Employer with or with or without the consent of the Guarantor or by any alteration in the obligations undertaken by the Contractor or by any forbearance whether as to payment time performance or otherwise but the Guarantor shall be entitled to be informed of such arrangements or alteration.

Given under our hand the day and year first above written.

Signed by the said Guarantor in the presence of	Signed (Illegible) ... CHUNG TEE KEONG Manager
Signed (Illegible) ... LOW JIN TEE Bank Officer	Signed (Illegible) ... CHAN HON KIET Senior Bank Officer
Signed by: ... for and on behalf of the Johore Port Authority in the presence of	Signed (Illegible) ... Pengurus Besar LEMBAGA PELABUHAN JOHOR, JOHOR

Signed (Illegible)
...
(Witness)

Signed for and on behalf of the said Johore Port Authority in the presence of)

...
(Witnesses)

Name: ...
Designation: ...

...
Name: ...
Designation: ...
Department's Seal: ...

Clause (2) of that bank guarantee is the crucial clause to consider. By substituting the word "guarantor" with the word "defendant", and substituting the word "Contractor" with the word "Indrawati", and again substituting the word "Employer" with the word "plaintiff", cl. (2) of the bank guarantee would read like this:

> The defendant shall not be discharged or released from his guarantee by any arrangement between (the) Indrawati and the plaintiff with or without the consent of the defendant or by any alteration in the obligations undertaken by (the) Indrawati or by any forbearance whether as to payment time performance or otherwise but the defendant shall be entitled to be informed of such arrangements or alteration.

In my judgment, if the defendant either by itself or through their solicitors perused through cl. (9) of the bank guarantee they would have seen the necessity to amend the original statement of defence. A guarantee is said to be a contract wherein the promisor undertakes to be accountable to the promisee for the "debt, default or miscarriage" of another person. Fry LJ said that: "Suretyship arises out of contract" (*Re Stratton, ex parte Salting* [1883] 25 Ch. D 148 at 151, CA). While Lord Diplock did say that: "The law of guarantee is part of the law of contract" (*Moschi v. Lep Air Services Ltd* [1973] AC 331 at p. 346; [1972] 2 All ER 393 at p. 400 HL). It is significant to mention that the words "debt, default or miscarriage" are taken verbatim from the English Statute of Frauds (1677), particularly s. 4 thereof as amended. Lord Diplock in *Moschi v. Lep Air Services Ltd (supra)* in lucid terms explained that:

> ... 'debt, default or miscarriage' is descriptive of failure to perform legal obligations, existing or future, arising from any source, not only from contractual promises, but in any other factual situations capable of giving rise to legal obligations such as those resulting from bailment, tort or unsatisfied judgments.

It is now trite law that a valid guarantee requires an agreement to be entered between the parties intending to create legal relations. The parties must have the capacity to contract supported fully by consideration, actual or implied.

At the local scene, reference should be made to *Chew Soon Tat v. Malaysia National Insurance Sdn Bhd* [1977] 1 MLJ 241 FC where the facts were that the appellant there gave a letter of guarantee to the respondent whereby the appellant undertook to stand guarantee to the extent of RM100,000 only on behalf of Messrs Senibert Sendirian Bhd. The latter had been sued for RM202,226.19 in respect of policies sold and premiums collected on behalf of the respondent. Judgment in default was entered against them. In the same suit a claim was made against the appellant for the sum of RM100,000 in terms of the letter of guarantee. The learned trial judge gave judgment in favour of the respondent. The appellant appealed. The Federal Court held that the letter of guarantee could not be impugned on grounds of absence or want of consideration. It was further held that a guarantor would only be liable for debts or liabilities incurred after the date of the guarantee and, consequently, the Federal Court varied the order of the learned trial judge to one of payment of such as may be found due in respect of policies sold and premiums collected after the date of the letter of guarantee. His Lordship Ali, Acting Lord President speaking for the then Federal Court had this to say:

> Here we need only refer to the following cases for the proposition that the guarantee would be in respect of liabilities incurred after the date thereof: *Wood v. Benson* 2 C & J 94, *Morrel v. Cowan* [1877] 7 Ch D 151 and *Sigma Cable Co Ltd v. Nam Huat Electric & Sanitary Co & Ors* [1972] 1 MLJ 7.

> Despite the loose wording of the Letter of Guarantee, we agree with the learned judge that it cannot be impugned on grounds of absence or want of consideration.

Section 79 of the Contract Act 1950 (Revised 1974) (Act 136) enacts as follows:

> A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of which default the guarantee is given is called the 'principal debtor' and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

Section 80 of the Contracts Act 1950 (Revised 1974) (Act 136) enacts as follows:

Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

ILLUSTRATIONS

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods, C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

(b) A sells and delivers goods to B, C afterwards request A to forbear to sue B for the debt for a year and promise that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

(c) A sells and delivers goods to B, C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

Finally, s. 81 of the Contracts Act 1950 (Revised 1974) (Act 136) enacts that:

The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

ILLUSTRATION

A guarantee to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable, not for the amount of the bill, but also for any interest and charges which may have become due on it.

As I said earlier, a valid guarantee requires a sufficient agreement. It is just like any other form of a contract (*M'Iver v. Richardson* [1813] 1 M & S 557). Of course, there must always be the concept of offer and acceptance. That offer must be on ascertainable terms which will then be received by an unqualified acceptance from the person to whom it is made. That is the law since time immemorial (*Sorby v. Gordon* [1874] 30 LT 528). What amounts to an offer that is capable of being converted into an acceptance which will then result in a binding contract of guarantee depends upon the words used and employed together with the context in which they are being used. A mere statement that the offeror has no objection to guaranteeing has been held in *M'Iver v. Richardson (supra)* as a mere invitation to treat. Whereas a positive assertion more of a statement to show a willingness to guarantee, for example a particular shipment has been held in *Sorby v. Gordon (supra)* to be a sufficient guarantee taken from the perspective of the dealings that persisted between the parties. However, a word of caution must be put on record. It is this. An old vintage case of *Westhead v. Sproson* [1861] 6 H & N 728 put forward the proposition that words which are too vague cannot amount to a guarantee.

The principles to be applied in construing contracts of guarantee are the same as those that are applied in construing contracts generally. In the words of Lord Diplock in *Pioneer Shipping Ltd v. BTP Tioxide Ltd* [1982] AC 724 at 736, [1981] 2 All ER 1030 at 1035 HL:

> The object sought to be achieved in construing any commercial contract is to ascertain what were the mutual intentions of the parties as to the legal obligations each assumed by the contractual words in which they ... chose to express them; or, perhaps more accurately, what each would have led the other reasonably to assume were the acts that he was promising to do or to refrain from doing by the words in which the promises on his part were expressed.

Confronted with and when dealing with the extent of a guarantor's liability, Lord Reid had this to say in *Moschi v. Lep Air Services Ltd (supra):*

> I do not get much assistance from the authorities such as they are, I go by the terms of the ... contract. I find nothing in the authorities which in any way prevents me from reaching what appears to me to be the natural meaning and effect of this contract.

One thing is certain. In dealing with a guarantee strictly as a mercantile contract, the court will not apply technical rules but rather would construe it in such a way as to fairly reflect what may fairly be inferred to have been the parties' real intention and understanding as agreed and expressed by them in writing in order to give full effect to it (*Eshelby v. Federated European Bank Ltd* [1932] 1 KB 254 at 266, DC per Swift J which was affirmed by the Court of Appeal and reported in [1932] 1 KB 423 CA). In this connection references may also be made to a host of authorities: (*Bank of Montreal v. Munster Bank* [1876] IR 11 CL 47 at 55 per Fitzgerald J; *Barber v. Mackrell* [1892] 68 LT 29 CA; *Other v. Iveson* [1855] 3 Drew 177 at 182 per Kindersley VC; *York City and Country Banking Co v. Bainbridge* [1880] 43 LT 732; *Edwards v. Jevons* [1849] 8 CB 436 at 440; *Eastern Union Railway Co v. Cochrane* [1853] 9 Exch 197 at 204, 206; *Morten v. Marshall* [1863] 2 H & C 305; and finally *Faber v. East of Lathom* [1897] 77 LT 168 at 169). The modern approach would be to ask this question: "What is the meaning of what the parties have said?" and not "What did the parties mean to say?" For an elaboration of this modern approach reference to *L Schuler AG v. Wickman Machine Tool Sales Ltd* [1974] AC 235 at 263, [1973] 2 All ER 39 at 55 HL per Lord Simon of Glaisdale is highly recommended. In short, in applying that modern approach, the courts will not be burdened by an interpretation based purely and solely on internal linguistic considerations. This seems to be the view of Brooke J in *Bank of Scotland v. Wright* [1991] BCLC 244 at 259. Of course, it goes without saying that extrinsic evidence of the whole factual scenario is admissible and it is always necessary for the purpose of ascertaining:

(1) whether the particular words in the guarantee would apply to that factual situation (*Lombard Finance Ltd v. Brookplain Trading Ltd* [1991] 2 All ER 762 at 764-765; [1991] 1 WLR 271 at 274 CA); and

(2) the terms of the contract (*Charrington & Co Ltd v. Wooder* [1914] AC 71 HL)

In the Malaysian context, the extent to which extrinsic oral evidence may be adduced is governed by ss. 91 and 92 of the Evidence Act 1950. In *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229, the then Federal Court had occasion to consider the scope of s. 92 of the Evidence Act 1950 in some detail and this was what the then Federal Court said:

> Section 92 specifically excludes evidence to contradict, vary, add to or substract from any of the terms of contract in writing, except in any of the situations spelled out in the provisos thereto.

In another part of the same judgment, the then Federal Court lucidly pointed out the danger of admitting oral evidence in cases where there is a written agreement, in these words:

> ... it would be open to any party to a litigation concerning an agreement to say that the agreement which is the subject matter of the dispute, did not contain all the terms thereof and to seek to introduce such terms or even terms which might not even have been within the contemplation of the other party. No agreement would then be safe from being re-written by one party in a court of law.

In *Tan Chong & Sons Motor Co (Sdn) Bhd v. Alan McKnight* [1983] 1 MLJ 220, Salleh Abas FJ speaking for the then Federal Court remarked that:

> ... the prohibition against admissibility of evidence under s. 92 only applies where all – as opposed to some only – of the terms of the contract are written into the agreement. Thus where some terms are given orally and some in writing, oral evidence could be given to prove the terms agreed to orally. The expression 'when the terms of any such contract' at the beginning of s. 92 must be read to mean 'when all the terms of any such contract.

On contra proferentum rule, if the words in the guarantee are ambiguous, the guarantee should be construed strictly against the guarantor for the simple reason that the guarantor is the maker of the instrument (*Mason v. Pritchard* [1810] 12 East 227; *Mayer v. Isaac* [1840] 6 M & W 605; and *Merle v. Wells* [1810] 2 Camp 413). The Privy Council in *Kandasami v. Mohamed Mustafa* [1983] 2 MLJ 85 (on appeal from Malaysia) said something about the contra proferentum rule. Lord Brightman said:

> There is a principle of construction that if a document *inter partes* contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution.

The contra proferentum rule was also applied by the then Federal Court in the case of *Malaysia National Insurance Sdn Bhd v. Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29. This was what the then Federal Court said:

> It also seems to me that as between the assured and the insurers, the exception clause in the proviso, on the ordinary principles of construction has, as far as possible, to be read against the insurance company, that is to say if there is a doubt as to its extent and the question were to arise as to the liability of the insurers, the construction most favourable to the assured must be given to him.

I have purposely digressed at great length to show the prevailing law applicable in a contract of guarantee. The essentials of a guarantee are on all fours with that of any other contract and they are well document by text-book writers as well as the learned judgments of eminent judges before me. The vitiating factors to render a contract of guarantee void like mistake, *non est factum*, misrepresentation, non-disclosure and concealment, duress, undue influence etc, are well settled. Now, leave to amend the statement of defence like the proposed amendments will definitely be granted to enable the defendant to raise a defence arising from a charge in the law since the commencement of the proceedings affecting the rights of the parties or the relief or remedy claimed by the plaintiff notwithstanding the fact that this might lead to an additional delay and expense and the trial will be protracted (*Application des SA v. Falks Veritas Ltd* [1974] Ch 381; [1974] 3 All ER 51 CA). As I said, the law in regard to a contract of guarantee is well settled. There is no new development to the law on the contract of guarantee as to warrant the defendant to amend the original statement of defence to incorporate the proposed amendments. The upshot would be to dismiss encl. 77 with costs. This was my judgment and I so ordered accordingly.

Lest I be accused of an oversight, it is now opportune to highlight certain authorities in regard to the general principles for leave to amend the statement of defendant as proposed by the defendant.

Abdul razak J in *Eshah binti Saat v. Meriam binti Sa'at & Ors* [1975] 2 MLJ 97, observed as follows:

> It has been held that in dealing with the application for amendment, the court has to consider the materiality and effectiveness of the amendment and that it was a well established practice not to allow an amendment where it appeared such an amendment would be useless. The court should look at the probable consequence of the amendment and if the amendment would be ineffectual then

it ought not to be allowed to be made. One such amendment was sought to be made in *Ponnusamy v. Nathu Ram* [1959] MLJ 228 and was refused.

Clearly, the amendment here, even if allowed would be of no value because I would not have been persuaded to grant the declaration asked for.

In *Chip Chong Sawmill Co Sdn Bhd & Ors v. Chai Khiun Fui* [1978] 2 MLJ 24 FC, Lee Hun Hoe CJ (Borneo) (as he then was) had this to say:

The question of partnership was never raised by the shareholders. In view of his finding that plaintiff was not the trustee and agent of Tsen Tuan and Chai Hsiun Ying, and the pleadings of the shareholders, the learned judge was, with respect, right to hold that para. 10 of the defence of the shareholders could not stand. In the circumstances, I cannot say he was wrong to refuse amendments to the said paragraph on the ground that it was not *bona fide* but merely to delay the fair trial of the pending suit.

In *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1990] 2 MLJ 65, the Singapore Court of Appeal had this to say in regard to an amendment which did not disclosure a reasonable defence to the claim:

In this appeal, the appellant submitted that the learned judge should have allowed the amendment as any prejudice could have been compensated by cost, leaving it to the respondent, if so desired, to take out the application to strike out the amendment. We disagree. In our view, in a contested interlocutory application for leave to amend pleadings, the principles to be applied are the same as if the application before the court had been an application to strike out the amendment pleadings. The question involved is the same. The test is whether the part to be added by amendment ought to be struck out as disclosing no reasonable defence to the claim.

Finally, the recent judgment of the Court of Appeal in *Abdul Johari bin Abdul Rahaman v. Lim How Chong & Ors* [1997] 1 MLJ 629, where Abdul Malek Ahmad JCA in a very lucid judgment, after reviewing the authorities pertinent and germane to the occasion, had this to say:

The authorities strongly indicate that the courts should lean towards granting applications for amendments even when a new cause of action or line of defence is raised, provided it is based on the same facts or arose out of the same transaction subject, however, to an award of costs to the other party for the injustice caused by the amendments.

On these considerations, we agree with the learned judge that as far as the amendments were concerned, there is no basic departure from the original pleadings which were grounded on the principles of equity.

Certainly I am bound by the decision of the Court of Appeal in *Abdul Johari bin Abdul Rahman v. Lim How Chong & Ors (supra)* but, with respect, in the present case the marked difference was the delay of 9 years 4 months 20 days before the defendant filed encl. 77 to incorporate the proposed amendments. For this and the other reasons advanced in the early part of this judgment, I had no choice but to dismiss encl. 77 with costs.

Reported by Ling Hea Hoon